of Section 1 of the Fourteenth Amendment to the Constitution of the United States that no state shall deny to any person within its jurisdiction the equal protection of the laws, and the Supreme Court of the State of Wisconsin erred in holding to the contrary.

2. Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 purporting to assess the taxes herein sought to be recovered back by appellant is in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law and the Supreme Court of the State of Wisconsin erred in holding to the contrary.

STATUTES INVOLVED.

The material portions of Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 are as follows:

"(1) For the purpose of this section.

"(a) 'Person' shall mean persons other than corporations as defined in subsection (1) of section 71.02.

"(b) 'Dividends' shall mean all dividends derived from stocks whether paid to shareholders in cash or property received in the calendar year 1933, or corresponding fiscal year, and deductible under subsection (4) of section 71.04.

"(d) 'Net dividend income' shall mean gross dividend income less seven hundred and fifty dollars.

"(2) To provide revenues for relief purposes there is levied and there shall be assessed, collected, and paid an emergency tax upon the net dividend income of all persons in the calendar year 1933 or corresponding fiscal year at the following rates:

"(a) On the first two thousand dollars of net dividend income or any part thereof, at the rate of one per cent

"(b) On the next three thousand dollars of net dividend income or any part thereof, at the rate of three per cent.

"(c) On all net dividend income above five thousand dollars, at the rate of seven per cent."

The normal income tax referred to in the Court's opinion and in the argument herein is found in Chapter 71 of the Wisconsin Statutes for 1933. The rates appear at Section 71.06 and the deduction of dividends from Wisconsin corporations hereafter referred to is found in Section 71.04 (4) which reads as follows:

"Persons other than corporations, in reporting incomes for purposes of taxation, shall be allowed the following deductions. * * *

"(4) Dividends, except those provided in Section 71.02 (2) (b) 2 and 3, received from any corporation conforming to all of the requirements of this subsection. Such corporation must have filed income tax returns as required by law and the income of such corporation must be subject to the income tax law of this State. The principal business of the corporation must be attributable to Wisconsin and for the purpose of this subsection any corporation shall be considered as having its principal business attributable to Wisconsin if fifty per cent or more of the entire net income or loss of such corporation after adjustment for tax purposes (for the year preceding the payment of such dividends) was used in computing the average taxable income provided by Caapter 71. * * *"

SUMMARY OF ARGUMENT.

A. The previous voluntary exemption of dividends from normal income tax affords no reasonable grounds for classifying the recipients thereof separately and subjecting them to a separate and distinct tax.

B. The rates of tax applied to the dividends bear no reasonable relation to the normal tax of which they were relieved and hence are arbitrary and discriminatory.

C. The true nature of the tax as a property tax, or an excise, makes it arbitrary and discriminatory because of the graduated rates.

D. The retroactive effect of the tax here in question renders it arbitrary and discriminatory.

ARGUMENT.

A. THE PREVIOUS VOLUNTARY EXEMPTION OF DIVIDENDS FROM NORMAL INCOME TAX AFFORDS NO REASONABLE GROUNDS FOR CLASSIFYING THE RECIPIENTS THEREOF SEPARATELY AND SUBJECTING THEM TO A SEPARATE AND DISTINCT TAX.

Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 creates a separate and distinct class of taxpayers consisting of the recipients, during a single year, of dividends from the corporations described in the Act. In considering whether this classification violates the provisions of the Fourteenth Amendment to the Federal Constitution there is little to be gained by considering in detail the name to be applied to the tax. Whether it be described as an income tax, a property tax, or an excise or privilege tax, it nevertheless establishes a separate class of taxpayers from whom a separate and distinct tax is demanded. It will be conceded that the Fourteenth Amendment permits classification in state legislation for purposes of taxation, as well as for other purposes, "provided always that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." (*LOUISVILLE GAS & ELECTRIC COMPANY v. COLEMAN*, 277 U. S. 32, 37).

> "The latitude of discretion is notably wide in the classification of property for purposes of taxation. * * * Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory."

ROYSTER GUANO COMPANY v. COMMONWEALTH, 253 U. S. 412, 415.

"However the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause, * * * and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause." *MEMPHIS & CHARLESTON RAILWAY COMPANY v. PACE*, 282 U. S. 241, 246.

Space does not permit a discussion of all of the numerous bases which have been considered from time to time in cases that have come before this Court and which have been held sufficient to justify some particular classification of taxpayers. Few of them are applicable here. The tax in question levied by Section 6 of Chapter 15 of the Laws of 1935 is in addition to and not in lieu of any of the other taxes levied in other sections of that Act, the proceeds of which are similarly devoted to "Emergency Relief" as set out in the Act. Although Chapter 15 of the Laws of 1935 is one of a series of taxing measures designed to raise funds for similar purposes in this and other years, no recipient of income or receipts during the year 1933 was required to pay any emergency or extra taxes under these similar measures. (See *Chapter 29, Laws of Wisconsin 1931-1932 Special Session, Chapter 363, Laws of Wisconsin 1933, Chapter 15, Laws of Wisconsin 1935.* These measures all laid emergency taxes on "net income" for various years. None of them cover the year 1933.) It does not appear that recipients of dividends from these particular sources made any undue contribution to the existence of the "Emergency" by reason of which they should be called upon to make a spe-

cial contribution to its relief. The fact that the Legislature referred to the tax in the title of the Act as an *emergency* tax is no ground for sustaining what might otherwise be an invalid classification.

> "Expense for relief of the unemployed is on no different footing than any other governmental expense." *SCOBIE v. TAX COMMISSION*, 225 Wis. 529, 538.

The decision of the Supreme Court of Wisconsin on the first appeal, 223 Wis. 319, (Tr. 6) finds one and only one ground or basis for the reasonableness of the classification adopted by the Legislature and that was the fact that these taxpayers were not required to include these dividends in the determination of their net income for 1933 subject to the so-called "normal income tax". The Supreme Court of Wisconsin said:

> "It is clear to us that there is but a single ground of differentiation, and that the classification must stand or fall upon this ground. Does the fact that the taxpayers who received dividends of Wisconsin corporations were exempt from a normal tax in 1933 so differentiate them from other persons receiving incomes during this year as to justify the subsequent levy upon them of a special income tax to meet a particular public emergency? * * * It is our conclusion that the fact that the income had previously been exempt from a normal tax is a sufficient reason for giving it different treatment upon the emergency tax. * * * In searching for subjects of emergency taxation, the legislature for this very reason might impose a special tax for emergency relief upon the recipients of this type of income." (Tr. 9).

The Supreme Court of Wisconsin referred the following situation: For a number of years Wisconsin has had, as an

integral part of its revenue system, an annual income tax levied upon the net income of its taxpayers from all sources as defined in the statute. In determining the net income subject to this tax the taxpayers in each year, including the year 1933, have been allowed to deduct the amount of dividends received from corporations which themselves have paid a Wisconsin income tax upon fifty per cent or more of their total net income. *(Wisconsin Statutes, 1933, Section 71.01 (4)).*

These dividends which the taxpayer was allowed to deduct in 1933 in determining his net income subject to the normal tax levied for general revenue purposes are the same dividends which Section 6 of Chapter 15 of the Laws of 1935 proposes to make the basis for a separate tax. The fact that these dividends were deducted for purposes of determining net income subject to normal tax is the only reason which the Supreme Court of Wisconsin could find for the classification. This deduction was allowed as being equitable since the corporations paying the dividend had paid tax on their own earnings.

> "The deduction of dividends from these corporations has long been part of the income tax system of the State of Wisconsin."
>
> This exemption or deduction "was purposely permitted by the Legislature in the belief that a sufficient tax on that earning had been paid by the corporation."
>
> (Dissenting opinion of Justice Fairchild, *WELCH v. HENRY*, 223 Wis. 319, 340).

> "The purpose of the Legislature was solely to prevent double taxation by the State of Wisconsin, of income received by individuals in the form of dividends."
>
> (Concurring opinion of Justice Brandeis, *MILLER v. MILWAUKEE*, 272 U. S. 713, 717).

"The state has adopted generally a policy of avoiding double taxation of the same economic interest in corporate income, by taxing either the income of the corporation or the dividends of its stockholders, but not both." *LAWRENCE v. STATE TAX COMMISSION*, 286 U. S. 276, 284, discussing a similar provision in Mississippi.

In other words the Supreme Court of Wisconsin has found in the fact that the Legislature, as evidenced by a policy continued over many years, has, in the past, deemed that it would be inequitable to include dividends in net income subject to tax a basis for now placing the recipients of such dividends in a special class and subjecting them to a special tax.

If this so-called "exemption" from normal tax can be made the basis of a classification at all, there should be some relation between the amount of taxes exacted from this class and the benefits which have accrued to them by reason of having been allowed the deduction for purposes of normal tax, particularly when the exemption is the only basis for the classification.

"But if the plan pursued (a substitute basis for property tax) is purely arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both." *UNION TANK LINE COMPANY v. WRIGHT*, 249 U. S. 275, 282.

"Under the previous decisions of the Supreme Court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subject to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic cor-

porations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the State, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property, including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the state authorities and the foreign insurance companies, in such a construction of paragraph 30, and in the practice under it. But an occupation tax imposed upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois, is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business, which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of that property. It is a denial of the equal protection of the laws." *HANOVER FIRE INSURANCE COMPANY v. HARDING*, 272 U. S. 494, 516.

B. THE RATES OF TAX APPLIED TO THE DIVIDENDS BEAR NO REASONABLE RELATION TO THE NORMAL TAX OF WHICH THEY WERE RELIEVED AND HENCE ARE ARBITRARY AND DISCRIMINATORY.

The tax here involved is measured by nothing except the amount of dividends received and bears not the slightest relation to the net income of the taxpayer from all sources which is the subject of the normal tax, or to the amount of tax he would have been required to pay had dividends been included in the determination of his income subject to normal tax. Whatever may be said in favor of this classification for purposes of a tax measured by including dividends in taxable income during 1933, there is gross discrimination

in subjecting that class to a tax measured only by the amount of dividends regardless of the effect of other transactions of the taxpayer upon his taxable income, or upon the amount of normal tax which he would have been required to pay had the dividends been included in his income subject to such normal tax. The difference arises partly from the difference in rates. Normal income tax rates for 1933 income were graduated from one per cent to a maximum of six per cent on all net income over $12,000.00. (*Wisconsin Statutes 1933,* Section 71.06 (1)). In addition there was a Teachers Retirement Surtax of the maximum rate of one per cent. (*Wisconsin Statutes 1933,* Section 71.26 (1)). From the taxes thus determined the taxpayers were allowed an exemption stated not in terms of taxable income but in terms of dollars of tax and varying from $8.00 upward depending upon their marital status and number of dependents. (*Wisconsin Statutes 1933,* Section 71.05 (2)). The tax here in question is also levied at graduated rates. There is no exemption in dollars of tax but instead there is an exemption of $750.00 of "dividend income". Thereafter the rates run from one to seven per cent but the maximum rate of seven per cent applies to all dividends above $5,000.00. This manifestly results in great discrepancies between the amount of dividend tax and the normal tax upon a like amount of net income. The appellant, who received dividends of $12,156.10 was called upon for a tax of $556.84. Normal income tax and surtax upon that same amount of net income would have been $468.42 less his exemption.

It is true, as was pointed out by the Supreme Court of Wisconsin, (Tr. 10) that this is not necessarily a fair comparison because the taxpayer's dividends might come in on top of other income and if subjected to normal tax, result

in a higher tax than the tax actually imposed. Here, however, and in the case of many other taxpayers, the existence of business losses, the payment of taxes and interest, and other deductions give the taxpayer a net loss for purposes of normal tax, no part of which is allowed to be set off against the tax now imposed. His net income for normal income tax would have been $2,321.29 if he had not been allowed to deduct the dividends which he received. (Tr. 15) The tax on that amount would have been $27.32 less such exemption from $8.00 upward as he would have been entitled to by reason of his marital status, etc. Because these dividends were not so included and he saved that amount in taxes, the Supreme Court of Wisconsin now considers that this was a sufficient basis for requiring him to pay $556.84 in taxes because of the receipt of those dividends. If he had had a net income subject to normal tax from other sources of $12,000.00, together with the dividends which he did receive, his saving in tax would have been the full maximum rate of seven per cent upon those dividends, about $850.00. Yet he is required by Section 6 of Chapter 15 of the Laws of 1935 to pay the same amount as if he had the larger actual income.

Other factors may justify imposing heavier burdens upon one class of taxpayers than upon others, but when, as here, the only basis for the classification is the prior exemption, the burden of the tax should be somewhere in line with the benefits conferred by the exemption. To have made it so would have involved no undue difficulties of administration since the State had the returns of 1933 income showing both the taxable income for that year and the amount of dividends there deducted and here taxed. See opinion of the court below. (Tr. 11)

Even if the deduction of the dividends in the prior year furnished a permissible basis for some sort of tax, it furnishes none for this tax. The ground of difference bears no "just and proper relation to the attempted classification." The tax is a "mere arbitrary selection".

C. THE TRUE NATURE OF THE TAX, AS A PROPERTY TAX, OR AN EXCISE, MAKES IT ARBITRARY AND DISCRIMINATORY BECAUSE OF THE GRADUATED RATES.

In discussing the constitutionality of the action of the Wisconsin Legislature in setting recipients of dividends apart as a separate class subject to a separate tax, it is not particularly important to decide exactly what sort of tax is assessed against the class. However, when we come to consider the fact that the tax upon that class, even assuming that the classification itself is valid, is imposed at a graduated and progressive rate, it does become necessary to consider just what sort of tax this is. Section 6 of Chapter 15 of the Laws of 1935 refers to the tax as one upon "dividend income". The prevailing opinion in the Supreme Court of Wisconsin referred to it as an "income tax". (Tr. 13) This was its characterization, according to the State Court, as far as concerned its authorization by Section 1, Article XIII of the Wisconsin Constitution. Of course, the Supreme Court of the United States is not bound by the name given to the tax or its characterization either by the Legislature or by the state court.

EDUCATIONAL FILMS CORPORATION v. WARD, 282 U. S. 379, 387

STEWART DRYGOODS COMPANY v. LEWIS, 294 U. S. 550, 555

SENIOR v. BRADEN, 295 U. S. 422, 429

"In passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *LAWRENCE v. STATE TAX COMMISSION*, 286 U. S. 276, 280.

It is true that the tax is measured by something that "comes in" to the hands of the taxpayer, namely, the dividends, but it is equally true that the tax is not one measured by a balancing of the net results of all the taxpayer's business transactions for the year. It is not a tax upon income, meaning thereby the gain or profit to the taxpayer from all of his business transactions as that term is used, for instance, in connection with federal income tax or the Wisconsin normal income tax. It is not laid upon what remains when "all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses." *PECK & CO v. LOWE*, 247 U. S. 165, 175.

"Income taxes generally do not select as the measure of their levies the income from one source only and neglect all others." *REDFIELD v. FISHER*, 135 Ore. 180.

We have seen that in the case of this particular taxpayer there is no relation between the amount of dividends which he received and his income from all his business transactions during the year. Taxes upon the net income of the taxpayer during the year from all transactions are sustained and graduated rates of tax are found to be nondiscriminatory because the income as thus defined is a fair measure of the ability to pay according to the graduated rates.

"Income taxes are a recognized method of distributing the burdens of Government favored because requiring contributions from those who realize current pecuniary benefits under the protection of the Government and

because the tax may be readily proportioned to their ability to pay." *SHAFFER v. CARTER,* 252 U. S. 37, 51.

"The tax (one on net income from all sources) which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income, etc." *LAWRENCE v. STATE TAX COMMISSION OF MISSISSIPPI,* 286 U. S. 276, 281.

"A tax measured by the net income of residents is an equitable method of distributing the burdens of Government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income, etc." *NEW YORK Ex Rel COHN v. GRAVES,* 300 U. S. 308, 313.

The Supreme Court of Wisconsin felt justified in characterizing this tax as an "income tax" as opposed to a tax which might be laid, for instance, upon gross receipts by reason of the fact that there are ordinarily few expenses in connection with the receipt of dividends so that there is not much difference between the gross receipts and the net receipts from that particular source. There is considerable doubt as to the correctness of this assumption. It is true that the taxpayer had no particular expense in connection with the mere collection of these dividends. However, he did sustain losses on the sale of other securities in the amount of $8,518.84. (Tr. 15) He is allowed no deduction for these losses although they go to reduce the net result of his proceeds as an investor. He paid interest during 1933 in the sum of $1,420.25 (Tr. 15) which amount might have been saved him had he chosen to dispose of the stock and pay the indebtedness upon which this interest was paid.

Even if it is true that the gross income from dividends may be considered as net income, the fact remains that when you measure the tax by receipts, whether gross or net, from some particular source, you are taxing something other than the net income of the taxpayer from all his activities during the taxable year. There does not exist the relationship between the receipts from a particular source and the ability to pay that exists in case of a tax based upon the net gain or profit of the taxpayer from all of his transactions during the year. In making this contention it is appreciated that in *UNITED STATES v. HUDSON*, 299 U. S. 498, this court characterized the tax imposed by the Silver Purchase Act of June 19, 1934, upon gains from a particular class of transactions regardless of other transactions of the taxpayer during the year as a "special income tax." However, it is to be noted that the tax there imposed was at a flat or uniform rate and the question here under consideration concerning the application of graduated rates to receipts from a particular source was not involved.

If the tax is not a tax upon "income" as that term is used in cases sustaining graduated taxes, then it should be considered either as a tax upon property or as some other form of excise. When the real nature and effect of the tax is considered, it is to all practical intents and purposes a property tax. There is only one measure of it, the amount of dividends received by the taxpayer from stock. To pick out this one source of receipts and levy a tax upon them is to directly tax the property from which the receipts are secured.

POLLOCK v. FARMERS LOAN & TRUST CO., 157 U. S. 429, 158 U. S. 601

DAWSON v. KENTUCKY DISTILLERIES, 255 U. S. 288

NORTHWESTERN MUTUAL LIFE INSURANCE CO. v. WISCONSIN, 275 U. S. 136

NATIONAL LIFE INSURANCE COMPANY v. UNITED STATES, 277 U. S. 508.

FEDERAL LAND BANK v. CROSLAND, 261 U. S. 374

MACALLEN CO. v. MASSACHUSETTS, 279 U. S. 620

WILLCUTS v. BUNN, 282 U. S. 216

SENIOR v. BRADEN, 295 U. S. 422

In *NORTHWESTERN MUTUAL LIFE v. WISCONSIN*, 275 U. S. 136, the court considered the validity of a Wisconsin Statute purporting to fix a license fee measured by a fixed percentage of gross income from all sources with certain exceptions not important here. The gross income so taxed included interest on federal bonds and this provision was held to be invalid.

> "To tax this would amount practically to laying a burden on the exempted principal." P. 140.

The force of this statement is not weakened by the holding in the recent case of *ADAMS MANUFACTURING CO. v. STOREN*, ... U. S. ..., 58 S. Ct. 913, which held that inclusion of interest on tax exempt municipal bonds in the "gross income" subject to an Indiana tax did not impair the obligation of contract. That determination depended upon the interpretation of the exemption statute, not upon whether the tax was one on property.

In *NATIONAL LIFE INSURANCE COMPANY v. UNITED STATES*, 277 U. S. 508, the court said:

> "It is settled doctrine that to directly tax the income from securities amounts to taxation of the securities themselves." p. 521.

In the dissenting opinion of Justice Brandeis in that same case, it was said:

> "Directly to tax the gross income from securities amounts, of course, to taxing the securities themselves." p. 532.

In *FEDERAL LAND BANK vs. CROSLAND*, 261 U. S. 374, it was held that a tax on the recording of mortgages was a tax upon the mortgages themselves.

In *SENIOR vs. BRADEN*, 295 U. S. 422, it was generally conceded that the state tax there involved was a property tax upon an interest in land owned by the holders of trust certificates, although the measure of the tax was the income distributed to the certificate holders during the preceding calendar year.

The characterization of the tax as a property tax is in nowise weakened by the fact that in cases such as *LAWRENCE vs. STATE TAX COMMISSION*, 286 U. S. 276, and *NEW YORK ex rel COHN vs. GRAVES*, 300 U. S. 308, the tests of the constitutionality of a tax measured by net income including receipts from property have been held to be different than what would be applied to a property tax. Such taxes are true income taxes based upon the net result of all of the taxpayer's transactions during the year. They do not single out the receipts from a particular source to the exclusion of the results of any other business or activities.

In *HALE vs. IOWA STATE BOARD OF ASSESSMENT AND REVIEW*, ... U. S. ....., 58 S. Ct. 102, the court considered whether the provisions of an Iowa statute requiring the income from tax exempt municipal bonds to be included in arriving at net income subject to an income tax

violated the constitutional prohibition against impairing the obligation of contract. The court was confronted with the question of whether the provision in the Iowa statute that the bonds should be exempt from tax prevented the inclusion of the interest in taxable income subject to an income tax. The court particularly considered *NEW YORK ex rel COHN vs. GRAVES*, 300 U. S. 308 and its implications and came to the following conclusion:

> "Two rulings emerge as a result of the analysis. By the teaching of the Pollock Case an income tax on the rents of land (157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759), or even on the fruits of other investments (158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108) is an impost upon property within the section of the Constitution (article 1, par. 2, cl. 3) governing the apportionment of direct taxes among the states. 300 U. S. 308, at page 315, 57 S. Ct. 466, 468, 81 L. Ed. 666, 108 A. L. R. 721. By the teaching of the same case an income tax, if made to cover the interest on government bonds, is a clog upon the borrowing power such as was condemned in McCulloch vs. Maryland, 4 Wheat. 316, 4 L. Ed. 579, and Collector vs. Day, 11 Wall. 113, 124, 20 L. Ed. 122, 300 U. S. 308, at pages 315, 316, 57 S. Ct. 466, 468, 469, 81 L. Ed. 666, 108 A. L. R. 721. There was no holding that the tax is a property one for every purpose or in every context. We look to all the facts."

The facts to which the court must look in considering the instant case are that the tax is not laid upon all net income and is not even laid upon all receipts. It is a separate and distinct tax laid only upon dividends from stock of certain corporations. Nothing else enters into the measure of the tax other than the amount of such dividends. A clearer case of taxing stock by purporting to tax the dividends could hardly be imagined.

Nor is the character of the tax as a property tax changed by considering it as an excise. The only events which have occurred which could possibly be considered as the subject of an excise are the continued holding of the stock by the taxpayers and the receipt by them of the dividends. No affirmative action of any kind is required on their part to subject them to the tax, nor have they any choice of action which would in any way affect the amount of tax they are required to pay.

In *DAWSON vs. KENTUCKY DISTILLERIES*, 255 U. S. 288, it was held that a tax upon the right to remove whiskey from bond amounted to a tax upon the whiskey itself.

> "The whole value of whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." p. 294.
>
> "To levy a tax by reason of the ownership of property is to tax the property." p. 294.

In *THOMPSON vs. McLEOD*, 112 Miss. 383, the State Court considered what purported to be a privilege tax upon the business of extracting turpentine from standing trees measured by a fixed amount upon each box cut. The statute was held to be invalid because it was in effect a property tax.

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural rght to extract gum from the tree as the owner of a vineyard has to pluck his own grapes."
>
> "Though the courts have gone far with the concept of taxable privilege, they have refused to extend it to any such point as this and have held that when this point is reached the concept has become so utterly fictitious that it can no longer serve as a legal screen that the

tax imposition is really upon the receipt which is nominally made the measure of the tax. The courts have therefore said that it is not permissible by any fiction of privilege to tax in fact the mere right of ownership of property or the legal incidents thereof."

STATE Ex Rel BOTKIN vs. WELSH, 61 S. Dak. 593.

"The mere right to own and hold property cannot be made the subject of an excise tax, because to tax by reason of ownership of property is to tax the property."

"The right to receive property (income in this instance) is but a necessary element of ownership, and, without such right to receive, the ownership is but an empty thing and of no value whatever." *JENSEN vs. HENEFORD*, ... Wash. ...., 53 Pac. (2) 607, decided January 14, 1936.

The distinction between this situation and one of the sort involved in *UNITED STATES vs. HUDSON*, 299 U. S. 498, where net income from the single source of trading in silver bullion was allowed to be the subject of a special tax, is made clear in the case of *WILLCUTS vs. BUNN*, 282 U. S. 216. There the court held that profits derived from the sale of municipal bonds could be included in net income subject to federal income tax, although interest on the bonds could not, and said:

"It does not follow, because a tax on the interest payable on state and municipal bonds is a tax on the bonds and therefore forbidden, that the Congress cannot impose a non-discriminatory excise tax upon the profits derived from the sale of such bonds." p. 227.

"The tax upon interest is levied upon the return which comes to the owner of the security according to the provisions of the obligation and without any further transactions on his part. The tax falls upon the owner by

virtue of the mere fact of ownership regardless of use or disposition of the security. The tax upon profits made upon purchases and sales is an excise upon the result of the combination of several factors." p. 227.

Whether the tax here involved is to be strictly denominated a property tax or not, where the measure of it is so closely bound up with the dividends which constitute the principal value of the stock, and the tax is claimed by reason of the mere ownership of the stock and the acceptance of those dividends when declared and paid, the questions as to the conformity of the taxing statute to the Fourteenth Amendment should be decided according to the same standards as would be applied in the case of an outright property tax.

It is assumed that there may be a valid classification of property for purposes of taxation but the application to the property in that class of varying rates results in an indefensible discrimination. The taxpayer who owns a thousand shares of stock and receives the dividends thereon, by that fact alone is required to pay a greater number of dollars per share owned than another taxpayer who owns but a hundred shares of that same stock. In *STEWART DRY-GOODS COMPANY vs. LEWIS*, 294 U. S. 550, the court in discussing the graduated rates applied by a Kentucky statute to a tax on gross sales said:

> "Thus understood, the operation of the statute is unjustifiably unequal, whimsical and arbitrary as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned." p. 557.
> "A pretended classification, that is based solely on a difference in quantity of precisely the same kind of

property, is necessarily unjust, arbitrary, and illegal. For example, a division of personal property into three classes, with the view of imposing a different tax rate on each,—class 1 consisting of personal property exceeding in value the sum of $100,000, class 2 consisting of property exceeding in value $20,000 and not exceeding $100,000, and class 3, consisting of personal property not exceeding in value $20,000—would be so manifestly arbitrary and illegal that no one would attempt to justify it." *In Re COPE'S ESTATE,* 191 Pa. 1, 22.

The case for the constitutionality of this tax is not improved by considering it as an excise tax. As we have seen it is a tax which bears no relation to the ability of the taxpayer to pay or to his net income from all sources. It is a tax upon the receipts, whether gross or net, from a particular source. That tax is levied at a progressive rate. A taxpayer owning two hundred shares of stock may very well be required to pay a higher rate upon the dividends received upon the second one hundred shares than those received upon the first. He may own stock in a corporation declaring dividends quarterly and be required to pay at a higher rate by reason of the receipt of the last dividend than he is required to pay by reason of the receipt of the first. It is difficult to distinguish any difference between such a situation and that presented in *STEWART DRYGOODS COMPANY vs. LEWIS,* 294 U. S. 550, and followed by the Supreme Court of the State of Wisconsin in *SCHUSTER vs. HENRY* in 218 Wis. 506. In that case the court sustained the contention that the Fourteenth Amendment was violated by a tax measured by gross sales and applied at a graduated rate. It pointed out the distinction between such a tax and a true income tax.

"Even in this aspect the classification is arbitrary, for the claimed relation of gross sales—the measure of the tax—to net profits fails to justify the discrimination between taxpayers." p. 558.

D. THE RETROACTIVE EFFECT OF THE TAX HERE IN QUESTION RENDERS IT ARBITRARY AND DISCRIMINATORY.

What has been said above has been without particular reference to the retrospective nature of the tax imposed by Section 6 of Chapter 15 of the Laws of Wisconsin for 1935. It has been pointed out that this act which was approved on March 14, 1935, imposed a tax measured by the dividends which had been received by the taxpayers during 1933. It thus purports to assess a tax based upon something that happened in the second preceding year and goes much further in that regard than any such taxing measures that have come to our attention. In considering the retroactive application of the statute, it must be borne in mind that this is not a curative or remedial statute having for its purpose collection of taxes actually assessed in the prior year but which for some reason had not been collected. In that respect it differs from such cases as *FLORIDA CENTRAL R. R. CO. vs. REYNOLDS*, 183 U. S. 471. It is not a remedial statute to confirm or ratify a questionable or improper administrative interpretation of some prior legislation and therefore differs from cases such as *HECHT vs. MALLEY*, 265 U. S. 144. It is not like such cases as *FLINT v. STONE TRACY CO.*, 220 U. S. 107, where income from a previous year was used to measure the contribution exacted by the state for the exercise of privileges during the current year. It is simply a tax authorized and levied during 1935 upon dividends which under the long existing policy of the state

had not been subjected to tax at all at the time they were received. During the year 1933 the state of Wisconsin had declared that it did not seek any taxes from these dividends. In 1935 it changed its mind about this and proposed to then take a tax which it had previously disclaimed and which it had previously thought it would be inequitable to collect.

It will be conceded that as far as the Federal Constitution is concerned, a taxing measure is not necessarily or automatically invalid by reason of the mere fact that it has some retrospective operation. Income tax measures have been held valid, although they include in their operation the income back to the beginning of the year in which they were passed. *LYNCH vs. HORNBY*, 247 U. S. 339, *COOPER vs. UNITED STATES*, 280 U. S. 409.

Changes in the rates, exemptions and other details of tax measures have been sustained although passed after the end of the year but before the tax measured by that year had been returned and paid. *FAWCUS MACHINE CO. vs. UNITED STATES*, 282 U. S. 375. Taxes upon incompleted transactions have been sustained although the transactions were commenced and decided upon before the Act was adopted. *BINNEY vs. LONG*, 299 U. S. 280.

Taxes for the exercise of a present privilege have been sustained although the amount of that tax is determined by reference to a period expiring before the Act was adopted. This is the basis for upholding the tax in cases such as *STOCKDALE vs. INSURANCE COMPANIES*, 20 Wall. 323, *FLINT vs. STONE TRACY CO.*, 220 U. S. 107. Retroactive measures imposing entirely new taxes may be valid when they apply to transactions during a period which had not yet expired when the measure was adopted. *BILLINGS vs. UNITED STATES*, 232 U. S. 261, *BRUSHABER vs.*

UNION PACIFIC, 240 U. S. ; *UNITED STATES vs. HUDSON,* 299 U. S. 498.

Although the retrospective nature of the tax here involved may not automatically render it invalid, it does accentuate and bring into sharp relief the discriminatory nature of the tax. Even if it were entirely proper to classify recipients of dividends in a separate class and subject them to a separate and distinct tax, it would not follow that it would likewise be proper to constitute a separate class composed of those who had received dividends in the past.

If you go back far enough to find the basis for any sort of tax you reach a point where the property, privilege, or income made the basis of the tax is so far removed from conditions present at the time the tax is imposed and from the taxpayer's ability to pay at the time the tax is imposed that the basis can be considered only as arbitrary and discriminatory. The present tax was imposed in 1935 upon dividends received by the taxpayer in 1933. During the year when the dividends were received, the taxpayer had no intimation that he was going to be called upon for a tax out of them. He filed his income tax return in March of 1934 reporting the receipt of these dividends and still no tax was demanded from him on account thereof. The entire year 1934 went by and still no tax was demanded. In the meantime his ability to pay had been subjected to the results of whatever business transactions he had during 1934. In March of 1935 the State of Wisconsin came along and announced that it had changed its mind about not requiring tax on these 1933 dividends and at that time demanded it. The matter was well expressed in the dissenting opinion of Judge Fowler, 223 Wis. 319, 332:

> "If income from dividends received in 1933 were properly subject to taxation why not those of 1932 or 1931?

Why not go back to 1929 when dividends were many and large, instead of 1933, when they were few and small?"

In *MILLIKEN vs. UNITED STATES*, 283 U. S. 15, a provision of the Revenue Act of 1918 imposing higher rates of federal estate tax were held applicable to gifts made in contemplation of death in 1916 and included in the gross estate. The Court pointed out that at the time the gifts were made they were subject to inclusion in the gross estate and the donor making them took his chances of a later increase in the tax burden.

"The reasonableness of the present application of the increased rate of tax of the 1918 Act must be determined in the light of the legislative policy which the 1916 Act had established before the gift was made." p. 23.

The transaction in silver bullion upon which the taxpayer was required to pay a retroactive tax by the statute considered in *UNITED STATES VS. HUDSON*, 299 U. S. 498, took place while the Act in question was before Congress and the likelihood of its adoption was apparent. In the present case the legislative policy in 1933 was to exclude these dividends from tax. The action taken in 1935 reversing that policy took the appellant completely by surprise and imposed a tax by reason of a prior but not a "recent" transaction. Retroactivity of the taxing statute to that extent and over that period of time is in itself enough to violate the Federal Constitution.

It has been held that an attempt to include property which has been the prior subject of a completed gift intended to take effect at death in the gross estate subject to federal estate tax is in violation of the Fifth Amendment.

"Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the

challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall." *NICHOLS vs. COOLIDGE*, 274 U. S. 531, 542.

An attempt to include completed gifts made before the adoption of the Revenue Act of 1924 as the subject of the gift tax imposed by that statute was held unconstitutional, *BLODGETT vs. HOLDEN*, 275 U. S. 142, even where the gift was made at a time when the legislation was before Congress. *UNTERMYER vs. ANDERSON*, 276 U. S. 440. An interpretation of Section 302 (d) of the Revenue Act of 1926 requiring the inclusion in the gross estate subject to tax of property conveyed to an irrevocable trust which would not have been so included at the time the trust was created violates the Fifth Amendment. *HELVERING vs. HELMHOLZ*, 296 U. S. 93; *WHITE vs. POOR*, 296 U. S. 98.

In *COOLIDGE vs. LONG*, 282 U. S. 582, the court considered state legislation by the state of Massachusetts which purported to subject to inheritance tax certain interests under trusts which had been irrevocably established before passage of the statute and which had given rise to no tax liability at the time of their creation. It was held that retroactive effect of the legislation violated the Fourteenth Amendment of the Federal Constitution.

> "No act of Congress has been held by this court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment." p. 599.
> "This court has not sustained any state law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment." p. 600.

The Supreme Court of the State of Wisconsin in the prevailing opinion, contented itself with saying:

"It is our conclusion, (1) that under this rule the legislature may measure an income tax by the income of a year sufficiently recent so that the income of that year may reasonably be supposed to have some bearing upon the present ability of the taxpayer to pay the tax; and (2) that the legislature, subject to this limitation, may go back at least to the most recent year for which they have returns furnishing data upon which to estimate the total return of the tax to the state. While the present tax may approach or reach the limit of permissible retroactivity, it does not exceed it." Tr. 11.

As to the first of these tests, the relationship between the period and ability to pay, it would seem that this tax when so tested should fail rather than be sustained. It is certainly not the experience of the writer and I doubt if it is the experience of very many, that the receipt of dividends or any other receipt during the year has any bearing upon the ability to pay during the second succeeding year. The matter was aptly put in the dissent of Justice Fowler, 223 Wis. 319, 332:

"The basis (1) of the court's rule by which to test the validity of the tax, that the year must be 'sufficiently recent so that the income of that year may reasonably be supposed to have some bearing upon the present ability of the taxpayer to pay the tax,' seems to me to be here absent. I see no connection between receipt of income from dividends in 1933 and present ability to pay a tax upon that item of income. Dividends of 1933 have 'gone with the wind' by this time in all but comparatively few cases."

In setting up the second test, that the legislature can go back "to the most recent year for which they have returns

furnishing a basis upon which to estimate the total return of the tax to the State", the court has substituted the convenience of the State for the rights of the taxpayer as the standard to be complied with. The returns referred to were apparently the returns for the purpose of determining normal income tax which all Wisconsin taxpayers are required to file on the 15th day of March in each year. The returns covering income for 1934 were due on March 15, 1935. Wisconsin Statutes, Section 71.09 (4). Section 6 of Chapter 15 of the Laws of 1935 was approved on the 14th day of March, 1935, the day before the returns covering income for 1934 were due. It was published and became effective March March 27th, twelve days after the returns were due. Under the rule fixed by the court this tax, merely because of its retroactive features, would have been invalid had it been passed the day after it was approved. It may be very well from the standpoint of the convenience of the legislature to fix such a standard, but this does not do the taxpayer any good. The tax is just as far removed from any reasonable basis and is just as arbitrary an enactment on the 14th day of March, 1935, as it is on March 15th.

It is apparent that if you go back far enough to select the time during which you are going to measure the tax, you must come to a point where there is so little relation between the income during the period involved and the taxpayer's ability to pay or any other element constituting any reasonable grounds for demanding a tax, that the effect is an arbitrary imposition which is beyond the legislature's power. That point has been reached when the legislature purports to impose a tax upon receipts for the second preceding year, a period for which taxes have already been levied and paid. When the taxpayer on March 15, 1934, filed his return of

income tax showing no tax demanded from him at that time, he was justified in assuming that his account with the state for that particular year had been settled and that his receipts for that year might be safely placed in his capital account. It is difficult to see how the imposition of a tax in 1935 upon these dividends amounts to anything except a property tax upon the receipts themselves. When the dividends reached the taxpayer's hands by transactions upon which the state was not then claiming any tax, they became so much property in his possession and no different from other dollars in the hands of other taxpayers that had come in some other manner. The singling out of this property in the hands of the appellant for taxation when other dollars were not taxed is an arbitrary discrimination.

CONCLUSION.

For the reasons herein stated the appellant submits that Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 has the effect of taking his property without due process of law and denying to him the equal protection of the laws and is therefore in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States and that the holding of the Supreme Court of the State of Wisconsin to the contrary should be reversed.

Respectfully submitted,

JOHN M. CAMPBELL,
Attorney for Appellant.